U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date OCT 14 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the previous decisions of the Director and the AAO will be affirmed.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on January 1, 1974. On July 14, 1989, the applicant was convicted of the offense of assault with a deadly weapon and was sentenced to five years imprisonment. On January 9, 1992, the applicant was served an Order to Show Cause for a hearing before an Immigration Judge and on January 13, 1992, he was released on a $2,5000 bond. On September 15, 1992, an Immigration Judge ordered the applicant deported to Mexico pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on April 22, 1993, and a warrant of deportation was issued. The applicant applied for a stay of deportation that was denied on August 2, 1994. On August 25, 1994, a U.S. District Court granted him a stay of deportation until further order. On September 29, 1994, the applicant was granted a preliminary injunction and on November 19, 1996, a warrant of deportation was issued. The applicant filed an appeal with the United States Court of Appeals for the Ninth Circuit, which was dismissed on November 19, 1996. A motion for a stay of deportation was denied on January 23, 1997, and the applicant was removed from the United States on January 24, 1997. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii) in order to travel to the United States and reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director Decision* dated November 13, 2002. The decision was affirmed by the AAO on appeal. *See AAO decision,* dated February 27, 2003.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception. – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the

> United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On motion counsel asserts that the AAO dismissed the appeal because he had not submitted the medical and psychological documentation for review. Counsel states that he had forwarded the documentation directly to the AAO and it should have been considered in the AAO's decision. In his motion to reopen counsel submits a brief, letters of recommendation from friends and family regarding the applicant's character, copies of the applicant's children's birth certificates, an affidavit from the applicant's spouse (Ms. [redacted] and a psychological evaluation on behalf of Ms. [redacted] In his brief counsel states that the applicant's spouse is heavily dependent on him for emotional support and that Form I-212 should be approved so the applicant can take care of his spouse. Additionally counsel states that the applicant's three children need the presence of their father while growing up.

The psychological evaluation based on one visit and states that Ms. [redacted] is very distressed with a high degree of depression mixed with anxiety. The evaluation states that Ms. [redacted] life has been influenced by a sexual assault that took place before she met the applicant. No additional detail of the type of treatment, if any, she is receiving was provided. During her psychological evaluation Ms. [redacted] stated that her family members are busy and unable to help her. This contradicts with her own affidavit in which she states that she " come[s] from a close knit family. Our lives revolve around each other. I would be completely lost with out the company of my siblings and my siblings would suffer without me. I have six sisters and three bothers; we all love each other dearly. We love to spend our free time in the company of each other. . . "

The evaluation concludes with a recommendation that Ms. [redacted] develop more independence and the ability to feel safe without the aid of others and that she will progress best in these areas with the presence and support of her husband. There is no independent corroboration to show that Ms. [redacted] medical condition will be jeopardized if she decides to relocate to Mexico with the applicant.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application is denied.

In his brief counsel refers to a non-precedent decision, *Matter of X,* 24 Immig. Rpt. B2-1 (AAU 2000), in which the AAO withdrew the Director's decision and approved the application. The AAO's decision was based on the fact that the applicant's son was born with a rare disease, which causes deafness and progressive loss of vision in adulthood. The applicant's son underwent a cochlear implant and his therapy required

constant monitoring by an eye specialist in the United States due to the absence of such medical treatment in the applicant's native country. In addition one of the favorable factors in this case was the absence of any criminal record for the applicant.

This is not the case in the instant matter. The record contains no evidence to indicate that adequate health maintenance and follow-up care and medication for the applicant's spouse and children are unavailable in Mexico.

In *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

> [T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In *Tin,* the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The court held in *Garcia–Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v.INS,* 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS,* 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter entered the United States without inspection in 1974, was placed in deportation proceedings on January 9, 1992, and married his naturalized U.S. citizen spouse on May 31, 1994,

over two years after he was placed in deportation proceedings. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties to U.S. citizens and lawful permanent residents, the approved petition for alien relative and the prospect of general hardship to his family.

The unfavorable factors in this matter include the applicant's unlawful entry in 1974, his criminal record, conviction of an aggravated felony, his employment without authorization and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was placed in deportation proceedings, can be given only minimal weight. The issues in this matter were thoroughly discussed by the Director and the AAO in their prior decisions. The applicant in this case failed to established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the motion to reconsider will be granted and the prior Director and AAO decisions will be affirmed.

ORDER: The motion to reconsider is granted and the prior Director and AAO decisions are affirmed.